UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA

JAMES D. MCCLELLAND,)	
)	
Plaintiff,)	
v.)	No. 1:03-cv-45
)	Edgar / Inman
JO ANNE B. BARNHART,)	, and the second
Commissioner of Social Security,)	
•)	
Defendant.)	

MEMORANDUM

On March 10, 2005, Rex Wagner, counsel for the plaintiff, James D. McClelland, filed a motion seeking an attorney's fee in the amount of \$11,733.00 out of the accrued/past-due Social Security benefits to be paid to the plaintiff. [Doc. No. 28-1]. Attached to the motion for an attorney's fee is the affidavit of Rex Wagner in support of his motion for attorney's fees. [Doc. No. 28-2]. In his affidavit, Wagner states in pertinent part that plaintiff has received his accrued/past-due Social Security disability benefits, except for \$12,920 – 25% of McClelland's accrued or past-due benefits – which has been withheld by the Social Security Administration for the payment of attorney's fees. [Doc. No. 28-2, ¶ 2]. Wagner further states that he and McClelland "have an attorney fee agreement for a contingent fee of 25% of past-due benefits . . ." *Id.* at ¶ 3. Finally, in his affidavit, Wagner states that the \$11,733.00 attorney fee which he is seeking represents approximately 23% of McClelland's accrued/past-due Social Security benefits.

The Sixth Circuit has held that a "twenty-five percent [contingent] fee agreement [in a Social Security disability case] 'should be given the weight ordinarily accorded a rebuttable presumption.'" *Royzer v. Secretary of Health and Human Services*, 900 F.2d 981 (6th Cir. 1990)(quoting *Rodriquez v. Bowen*, 865 F.2d 739, 746 (6th Cir. 1989)(en banc)).

On March 31, 2005, the defendant, the Commissioner of Social Security filed a response to the motion for authorization of an attorney's fee pursuant to 42 U.S.C. § 406(b), [Doc. No. 31] in which the Commissioner stated she had no objection to the attorney fees in the amount requested of \$11.733.00. Thereafter, on April 1, 2005, after the matter had been referred to him [Doc. No. 30], United States Magistrate Judge Dennis H. Inman issued a report and recommendation: (1) finding that the attorney fee requested was reasonable and (2) recommending that the motion for attorney's fees pursuant to 42 U.S.C. § 406(b) be GRANTED, and that McClelland's counsel be awarded an attorney's fee of \$11,733.00. [Doc. No. 32]. No objection has been filed to the report and recommendation of the United States Magistrate Judge.

Accordingly:

- (1) The motion for authorization of an attorney's fee pursuant to 42 U.S.C. § 406(b) [Doc. No. 28-1] will be **GRANTED**;
- (2) Plaintiff's counsel, Rex A Wagner will be **AWARDED** an attorney's fee of \$11,733.00 out of the \$12,920.00 in accrued/past-due Social Security disability benefits which have been withheld from the plaintiff by the Commissioner for the payment of an attorney's fee.

A separate order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE